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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. .....

71-758

JOHN CHARLES GREEN,

Petitioner,

—v.—

STATE OF MISSOURI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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No. .....

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STATE OF MISSOURI,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

The petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Missouri entered in this proceeding on September 13, 1971.

Opinions Below

The opinion of the Supreme Court of Missouri affirming the conviction is reported at 470 S.W.2d 565, and is set forth in the Appendix, *infra*, at p. 1a. The oral ruling of the Circuit Court of Randolph County, Missouri, is set forth in the Appendix, *infra*, at p. 15a. The sentence and judgment rendered by the Circuit Court of Randolph County, Missouri is set forth in the Appendix, *infra*, at p. 20a.

Jurisdiction

The judgment of the Supreme Court of Missouri sitting *en banc* affirming petitioner's conviction was entered on September 13, 1971. The jurisdiction of this Court rests upon 28 U.S.C. Section 1257(3).

Questions Presented

1. Whether it is cruel and unusual punishment and a denial of due process and equal protection under the Fourteenth Amendment, for prison authorities to deny an inmate protection from imminent, massive homosexual rape by other prisoners.

2. Whether a State may make non-violent escape a crime, where it is the only remedy available for self-preservation where the State has not provided any other adequate remedies for such self-preservation, and where the State has created those unconstitutional conditions which threatened the life and physical security of the prisoner.

3. Whether prison authorities have an affirmative duty to provide access to the Courts by securing legal advice for indigent inmates who through ignorance alone have not requested the assistance of an attorney.

Statement of the Case

On April 21, 1969, following a non-jury trial in the Circuit Court of Randolph County, Missouri, petitioner was convicted of felonious escape and was sentenced to three years imprisonment. On appeal the Supreme Court of Missouri affirmed.

The Courts below rejected as legally insufficient petitioner's assertion of the defense of justification. The majority of the Supreme Court of Missouri summarized the offer of proof as follows:

"Near the end of December, 1966, shortly after [petitioner] became an inmate at the Training Center, he was attacked in his cell at night by two inmates and submitted

to acts of sodomy under threat of death or great bodily harm;[1] that immediately thereafter he feigned an attempt at suicide and was taken to the prison hospital where he told the authorities of the assaults and asked to be removed from the institution to avoid further assault; that he was told by the Center authorities to resolve his own problems and to 'go back and fight it out.'[2] Approximately two weeks later, near the middle of January, 1967, he was again homosexually assaulted in his cell, this time by three inmates.[3] He again feigned an attempt at suicide and requested that he be taken to the hospital. Instead he was x-rayed and immediately thereafter taken before the Disciplinary Board and charged with attempted self-destruction. He informed this Board of the assaults, requested protection, and was moved to another wing of the Training Center.[4] He says that he was told by a member of the Board that he would have to 'fight it out, submit to the assaults, or go over the fence.'[5] [Petitioner] declined to disclose the names of his assailants to the Training Center authorities. Approximately three months later, on April 14, 1967, during the noon hour, a group of four or five inmates told [petitioner] that they would be at his cell that night and he would submit to their homosexual desires or they would kill or seriously harm him.[6] He did not report this threat to anyone. He escaped at about 6 P.M. that evening." [He

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[1] Tr. 389-391.

[2] Tr. 392, 394.

[3] Tr. 404-405.

[4] Tr. 407-409.

[5] Tr. 417.

[6] Tr. 387, 422.

was] " . . . apprehended the next day by a State Highway Patrolman some distance from the Training Center.

[Petitioner] further offered to prove that he was indigent,[7] that legal services for indigent persons were not provided at the Training Center by lawyers or law students, or by so-called 'jail house lawyers' who 'practiced' clandestinely only,[8] that the only law books in the Center's library were a set of Missouri Revised Statutes."[9]

The dissenting opinion in no way conflicted with the majority's summary of the petitioner's offer of proof. In a more detailed exposition of the same offer of proof Judge Seiler stated the facts as follows:

[Petitioner] was white, nineteen years old, five feet, nine inches tall and weighed about one-hundred and fifty pounds. At the Moberly Training Center for Men, the prison population was composed of about six-hundred inmates, mostly second offenders at least twenty-five years old, and at least twenty-five inmates were serving life sentences.[10] The inmates were confined in single cells within a residential building. The physical structure of the residential building was formed by a central rotunda with the four inmate wings radiating outward. Within each inmate wing, there were seventy-nine cells. During the day, the inmates could wander freely within the residential building. The inmates were locked in the cells at night.

There were two guards assigned to each residential building for the period of the night shift. One of these

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[7] Tr. 418.

[8] Tr. 356.

[9] Tr. 146.

[10] Tr. 331, 332.

guards stayed in the rotunda. The rotunda was separated from each wing by a heavy door. The second guard walked a circuit among the four wings. There were substantial periods of time during which a wing would be without supervision.

There was a lock on the outside of each cell. The door could be unlocked with a master key. It appears that several master keys were illicitly in the hands of the inmates. These locks could easily be picked with any sharp object. There were no locks on the outside of the cell doors.

Inmate complaints could be sent to the prison administration by the use of 'snitch-kites'. A 'snitch-kite' consisted of a written complaint transmitted through the intra-prison mail. It required several days to obtain any response to a 'snitch-kite'. An inmate could complain directly to a guard. Because of the physical structure of the residential buildings, it would be difficult to complain to a guard without the other inmates being aware of this action. Administrative policy was not to investigate a complaint of physical abuse unless the assailant was identified.[11] But if an inmate 'snitched'—turned in somebody's name—his life wouldn't be worth 'a plugged nickel'; he [the snitch] 'was as good as dead right then'. Unless a guard witnessed an assault, the alleged assailant would be allowed to remain within the general population during the investigation.[12] The victim of an assault could be removed from the general prison population. However, such an inmate would be confined to the 'hole', which was the area used to discipline prisoners.[13] The prison provided

[11] Tr. 351.

[12] Tr. 351.

[13] Tr. 350.

no other facilities for the protective custody of a threatened inmate.

In late December, 1966, or early January, 1967, during the night, two inmates, one white, one black, picked the lock of defendant's cell door.[14] At knifepoint, [petitioner] was homosexually ravaged by both inmates.[15] Two weeks later, three inmates, black and white, invaded [petitioner's] cell, knocked him unconscious as he tried to flee, and raped him. Homosexual acts including sexual assaults were matters of common knowledge among the inmates.[16]

Following each sexual assault, the [petitioner] injured or feigned injury to himself, in order to contact the prison administration.[17] While hospitalized after the first attack, [petitioner] informed the Assistant Superintendent of Treatment of the assault and requested protection.[18] This prison official admonished the [petitioner] to defend himself,[19] and upon release from the hospital [petitioner] was returned to the same cell.[20] After the second attack, [petitioner] was taken before the Disciplinary Board where he informed the Board about the assaults. The Assistant Superintendent of Custody, a member of the Board, told [petitioner] that the only protection [petitioner] would receive was a cell change. This prison official told [peti-

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[14] Tr. 389.

[15] Tr. 380, 390.

[16] Tr. 286.

[17] Tr. 407.

[18] Tr. 394-395.

[19] Tr. 395.

[20] Tr. 400.

tioner] that the alternatives were to defend himself, submit, or 'go over the fence'.[21]

On April 14, 1967, [petitioner] returned to his cell during the lunch break. Four or five black inmates gathered around his cell. They informed [petitioner] of their knowledge of the previous acts of sodomy. They told him that they would return that evening to make him a 'punk' (a person who plays a female role in homosexual incidents)[22] for the remainder of his time in prison. These inmates threatened to 'beat his head in' or kill [petitioner] if he would not submit.[23] [Petitioner] believed it would do no good to ask the prison authorities for help, in view of what he had been told in response to his previous attempts to get help,[24] so to avoid what he believed was inevitable, he quietly escaped about 6:00 o'clock that evening. He was found the next morning, on the side of a county highway, only a few miles from the prison and surrendered without resistance."

The Circuit Court ruled that the evidence did not constitute a legal defense of justification for escape and could not be presented to a jury for consideration in the action.[25] Immediately after this ruling, petitioner waived a jury, evidence was offered by the state on the offense charged, and the Court found him guilty.

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[21] Tr. 417.

[22] Tr. 387.

[23] Tr. 422.

[24] Tr. 462.

[25] Tr. 484.

How the Federal Questions Were Raised

The questions tendered herein were presented to the State by way of a motion for a new trial following the trial. In the motion Petitioner asserted that the State of Missouri violated the due process requirements of the Fourteenth Amendment when it found a man guilty for the felony of escape after the uncontroverted evidence showed that the State placed him in a situation where he could protect himself from forced homosexual attacks only by flight. Petitioner additionally urged that the trial court erred in finding petitioner guilty without considering the conditions of his confinement as a defense to escape, which conditions shocked the conscience and were cruel and unusual punishment and thus directly relevant to the question of violation of due process by punishing an individual for fleeing from such cruel and unusual punishment (Tr. 556, 557).

The issues were raised thereafter by Appellant's Statement, Brief and Argument to the Supreme Court of Missouri. The Supreme Court of Missouri passed on the questions in its opinion. See Appendix, *infra*, at pp. 4a-7a.

Reasons for Granting the Writ

1. The importance of the question.

The question presented here focuses on a problem of broad national significance—the cruel and inhumane conditions of prisons in the United States and the duty of courts to protect prisoners' constitutional rights. The instant case is a clear example of denial of the most fundamental rights. It highlights the worst of prison conditions. The fact that a slightly built nineteen year old prisoner could be raped by groups of roving inmates and was

repeatedly denied protection by prison authorities, bespeaks the most shameless denial of due process and equal protection under the Fourteenth Amendment.

Petitioner's dilemma is the rule of prison life; studies disclose that homosexual rape is the average inmate's introduction to prison life. *See* Footnote 1, dissenting opinion, Supreme Court of Missouri, Appendix, *infra,* at p. 10a. The fact that prison authorities would not provide protection from imminent five-fold rape should be the occasion for the Court to declare basic due process standards for state compelled confinement. Indeed this case can be the opportunity for the Court to announce guidelines on safety of prisoners, rights of prisoners to safely and adequately communicate with prison authorities, rights of prisoners to obtain a fair hearing before disciplinary boards, and to obtain access to the Courts through prison-provided legal assistance for indigent and ignorant prisoners. *See generally,* Task Force on Corrections, President's Commission on Law Enforcement and Administration of Justice (1967); Manual of Correctional Standards, American Correctional Association (1964).

2. The decision below is in conflict with the elementary rights of due process and equal protection as enunciated by the Court.

The Court has held that constitutional guarantees follow a person through state prison gates. See *Johnson* v. *Avery,* 393 U.S. 483 (1969), *Washington* v. *Lee,* 390 U.S. 333 (1968), *Cooper* v. *Pate,* 378 U.S. 546 (1964). Especially in the prison context, prohibition against cruel and unusual punishment is one of a person's most essential guarantees. This prohibition is applicable to the states. *Robinson* v. *California,* 370 U.S. 660 (1962). Clearly the prohibition controls the actions of prison authorities. See *Wright*

v. *McMann*, 387 F.2d 519 (2d. Cir. 1967); *Jordan* v. *Fitzharris*, 257 F. Supp. 674 (N.D. Cal. 1966); *Landman* v. *Peyton*, 370 F.2d 135 (4th Cir. 1966); *Austin* v. *Harris*, 226 F. Supp. 304 (W.D. Mo. 1964); *Holt* v. *Sarver*, 309 F. Supp. 362 (E.D. Ark. 1970); *Curley* v. *Gonzales*, Civ. No. 8372 (D.N. Mex. Feb. 12, 1970); *Landman* v. *Royster*, —— F. Supp. ——, 40 U.S.L.W. 2256, U.S.D.C. E. Va. (Nov. 9, 1971).

The basic concept underlying this prohibition is "nothing less than the dignity of man . . . [and that] while the State has the power to punish, the Amendment stands to assure that this power be exercised within the limits of civilized standards." *Trop* v. *Dulles*, 356 U.S. 86, 101 (1957).

Contributing to forced homosexual acts upon a nineteen year old boy is not within the limits of the State's power to punish. The prison had inadequate locks on cell doors (Tr. 26); it had one guard at night to protect three hundred men (Tr. 344, 346) who had relative freedom of movement without surveillance by guards for long periods during the night (Tr. 336). The prison had no safe, swift remedies available to stem physical and mortal threats from other roving inmates. It had no procedure by which a young and inexperienced inmate could bring his complaints to the attention of the courts or to other agencies outside the prison.

These conditions are amplified by the facts in this case. Petitioner was attacked and raped twice, and complained to officials both times. He received no response the first time, was charged with infraction of prison rules the second time, and was advised by the Assistant Superintendent to "fight it out, submit, or go over the fence." Under these cir-

cumstances, the prison conditions constituted a refusal by the state to protect life and limb. Cruel and unusual punishment was visited on the petitioner by the state as surely as if the state's employees had personally participated in the assaults.

Under the equal protection clause, the State has a duty to protect prisoners from physical assault. The state's duty to protect its citizens from personal violence is a responsibility that must be accorded to all classes of citizens, including prisoners, without arbitrary distinction. *United States* v. *Lynch*, 94 F. Supp. 1014 (N.D. Ga. 1950), *aff'd* 189 F.2d 476 (5th Cir.), *cert. denied* 342 U.S. 831 (1951). *Huey* v. *Barloga*, 277 F. Supp. 864 (N.D. Ill. E.D. 1967).

When Petitioner was threatened by five inmates who said that they would return that evening and force him to submit to their assaults or seriously injure or kill him, Petitioner had no alternative remedy but to escape non-violently. It was obvious from past experience that the State would not provide adequate remedies and protection from imminent death or serious injury. It is unconstitutional for the State to make criminal the utilization of the only remedy available to avoid death or serious injury caused by unconstitutional conditions. Under such severely circumscribed situations where imminent death or great bodily harm is involved, and the remedy is utilized on a wholly non-violent basis, the utilization of the remedy cannot be made a separate criminal offense by the State.

3. The decision below is in direct conflict with the Court's recent decisions setting forth guidelines for prisoners' rights to access to the Courts.

The State has found in its decision below that there was no evidence that the State denied Petitioner access to the courts even though the prison forbade "jail-house lawyers" to function, and even though no lawyers or law students were made available to inmates, and there was no adequate law library. This finding was based on the fact that there is no explicit showing that Petitioner in fact desired access to the courts.

The finding of the court below contradicts the Court's decision in *Johnson* v. *Avery*, 393 U.S. 483 (1969), recognizing a prisoner's right to access to the courts. The Court there said in connection with protecting that right that it was incumbent upon the state to insure that prisoners have whatever assistance was necessary to file competent petitions and complaints with the courts. The State's duties in connection with that right were further expanded to include "all the means a defendant or petitioner might require to get a fair hearing from the judiciary on all charges brought against him or grievance alleged by him." *Gilmore* v. *Lynch*, 319 F. Supp. 105, 110, affirmed *per curiam, sub nom. Younger* v. *Gilmore*, 40 U.S.L.W. 4003 (Nov. 10, 1971). In this instance Petitioner was denied means to present his grievances to the judiciary. It would be unreasonable for the State to insist that Petitioner, a nineteen year old inexperienced youth who had been physically terrorized, specifically ask for that which it is the duty of the State to provide. On the record in this case, it is clear his failure to request an attorney resulted from ignorance

and confusion, and the impression conveyed to Petitioner by the prison administration and staff that they would do nothing further to help him, and that there was nothing further that could be done.

CONCLUSION

For the reasons set forth above, the petition for certiorari should be granted.

Respectfully submitted,

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APPENDIX

Majority Opinion of the Supreme Court of Missouri Affirming Conviction

IN THE

SUPREME COURT OF MISSOURI

EN BANC

No. 55,031

STATE OF MISSOURI,

Respondent,

—VS.—

JOHN CHARLES GREEN,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF RANDOLPH COUNTY

Honorable Lawson Romjue, Special Judge

John Charles Green (hereinafter defendant) was charged by information with the offense of escape from a state institution[1] in which he was lawfully confined, a felony. Section 557.351.[2] He waived a jury, was tried before the court, found guilty, and was sentenced to imprisonment for a term of three years. He appeals. We affirm.

Briefly, the evidence is that defendant was convicted of burglary in November, 1966, and sentenced to imprisonment for a term of three years in the custody of the Department of Corrections; that on April 14, 1967, at about 6 p.m., while

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[1] The Missouri Training Center for Men, at Moberly, an institution under the control of the State Department of Corrections.

[2] Statutory references are to RSMo 1969 and V.A.M.S.

serving this sentence at the Training Center, he disappeared from that institution and was apprehended the next day by a State Highway Patrolman some distance from the Training Center. Defendant tacitly concedes that these are the facts and that, standing alone, they are sufficient to sustain his conviction. However, he contends that his escape was justified and that the justification constituted a legal defense to the charge of escape.

At a pretrial conference the defendant informed the court that his defense would be that prior homosexual assaults and threats near noon on the day of his escape of a homosexual assault upon him that night by other inmates caused the conditions of his confinement to be intolerable; and, that these conditions, together with the state's denial to him of access to the courts, made it necessary that he escape in order to protect himself from submission to the threatened assault or the alternative of death or great bodily harm. As a result of this conference it was agreed that on trial day, and before a jury would be impaneled, the court would hear evidence offered by defendant in support of his defense, consider it as an offer of proof, and rule on its sufficiency as a legal defense.

The evidence offered on this issue is, in substance, that near the end of December, 1966, shortly after defendant became an inmate at the Training Center, he was attacked in his cell at night by two inmates and submitted to acts of sodomy under threat of death or great bodily harm; that immediately thereafter he feigned an attempt at suicide and was taken to the prison hospital where he told the authorities of the assaults and asked to be removed from the institution to avoid further assault; that he was told by the Center authorities to resolve his own problems and to "go

back and fight it out." Approximately two weeks later, near the middle of January, 1967, he was again homosexually assaulted in his cell, this time by three inmates. He again feigned an attempt at suicide and requested that he be taken to the hospital. Instead he was placed in a disciplinary cell until the next morning when he was x-rayed and immediately thereafter taken before the Disciplinary Board and charged with attempted self-destruction. He informed this Board of the assaults, requested protection, and was moved to another wing of the Training Center. He says that he was told by a member of the Board that he would have to "fight it out, submit to the assaults, or go over the fence." Defendant declined to disclose the names of his assailants to the Training Center authorities. Approximately three months later, on April 14, 1967, during the noon hour, a group of four or five inmates told defendant that they would be at his cell that night and he would submit to their homosexual desires or they would kill or seriously harm him. He did not report this threat to anyone. He escaped at about 6 p.m. that evening.

Defendant further offered to prove that he was indigent; that legal services for indigent persons were not provided at the Training Center by lawyers or law students, or by so-called "jail house lawyers" who "practiced" clandestinely only; that the only law books in the Center's library were a set of the Missouri Revised Statutes.

The court ruled that the evidence did not constitute a legal defense. Immediately after this ruling, defendant waived a jury, evidence was offered by the state on the offense charged, and, as previously noted, the court found him guilty.

Defendant asserts that the described conditions of his confinement constituted cruel and unusual punishment with-

in the meaning of the Eighth Amendment; and that subjecting him to those conditions without providing reasonable protection for his person and without according him a means of determining the propriety of his confinement denied him equal protection of the law and due process of law in violation of his rights under the Fourteenth Amendment to the Constitution of the United States.

Two of the points in his brief are that "[t]he trial court erred in excluding the offer of proof because to do so violated due process in that it permitted appellant to be convicted and punished for escape even though [1] escape was his only means of obtaining access to the courts for review of allegedly unconstitutional treatment, [and 2] the state had made escape necessary for appellant to protect himself from impending grave physical harm."

In his printed argument, defendant states quite candidly that the alleged unwholesome and unconstitutional conditions, *in themselves alone*, would not justify his escape; that "[t]he needs for security and discipline in the corrections system are such that it would be folly to create a defense for any prisoner who escaped the system because he thought he was being held under unconstitutional or unwholesome conditions." His position is that these conditions "* * * *combined with* one or both of two *other* factors do justify his escape * * * " and that the other factors are " * * * [1] *denial by the State of access to the courts* for redress of the unconstitutional conditions * * * [and] * * * [2] the *necessity* under those unconstitutional conditions to escape as the only means of protecting himself * * * ." In oral argument, he stated his position succinctly as a denial of due process by exclusion of his "defense of necessity."

There is no evidence that the state denied him access to the courts, unless it may be said that the Training Center

rule forbidding "jail house lawyers" from giving legal advice to and preparing pleadings for inmates was such denial, or that failure to have lawyers or law students available to inmates at the Center was such denial. Defendant argues that it is precisely for these reasons that he was denied access to the courts. However, there is no evidence that during the period between the beginning of his confinement and the hour of his escape he desired or sought access to the courts. There can be no denial unless there exists in the defendant a desire and a seeking of access to the courts. The mere fact that legal assistance was not directly or immediately available to inmates in general and, therefore, would not have been available to him *if* he had sought access to the courts does not afford him substantial ground upon which to base a claim of denial of access where there is no showing that he, in fact, desired access to the courts. To hold, as defendant requests, that the state denied him access to the courts would require that we assume the existence of a necessary fact, one which he declined or neglected to furnish. We decline so to assume.

Johnson v. Avery, 393 U.S. 483, 89 S. Ct. 747, 21 L.Ed.2d 718 (1969), upon which defendant primarily relies in support of his contention that he was denied access to the courts, is not applicable to the facts in this case. *Johnson* involved an attack by a "jail house lawyer" upon a prison regulation which prohibited him from advising with or preparing petitions for writs for other inmates.

Moreover, the record shows that the mails were available to defendant for access to the courts. We know from our records that this means of access is now, and has been since long before January, 1967, used by inmates in increasing numbers, and through that method inmates readily secure the appointment of a lawyer to assist them.

The state did not deny defendant access to the courts.

Defendant says he has been unable to find any Missouri cases supporting his theory of "necessity" as a defense in this case. We find none. The state refers us to People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597 (1969), for a concise definition of the defense of necessity. The California Court of Appeal said: "The principle of justification by necessity, if applicable, involves a determination that 'the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged.' * * * The compulsion from the harm or evil which the actor seeks to avoid, should be present and impending * * * ." 75 Cal. Rptr. at 604.[3]

This is not a case where defendant escaped while being closely pursued by those who sought by threat of death or bodily harm to have him submit to sodomy. Moreover, the threatened consequences of his refusal to submit could have been avoided that day by reporting the threats and the names of those making the threats to the authorities in charge of the Center. Defendant had several hours in which to consider and report these threats.

The defense of "necessity" was not available to defendant and the court did not err in excluding his offer of proof. Defendant's defense resolves itself into the simple proposition that the conditions of his confinement justified his escape. Generally, conditions of confinement do not justify

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[3] See also: State v. St. Clair, 262 S.W.2d 25[2], where this court said at l.c. 27-8: "But, to constitute a defense to a criminal charge, the coercion must be present, imminent, and impending and of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the act is not done. Threat of future injury is not enough. Nor can one who has a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily injury invoke the doctrine as an excuse."

escape and are not a defense. State v. King, 372 S.W.2d 857[6]; State v. Pace, 402 S.W.2d 351; State v. Hart, 411 S.W.2d 143; State v. Rentschler, 444 S.W.2d 453[4].

The judgment is affirmed.

FRED L. HENLEY, *Judge*

All concur except Seiler, J., who dissents in separate dissenting opinion filed.

Dissenting Opinion of Hon. Robert E. Seiler

IN THE

SUPREME COURT OF MISSOURI

EN BANC

No. 55,031

STATE OF MISSOURI,

Respondent,

vs.

JOHN CHARLES GREEN,

Appellant.

As is apparent from the majority opinion, the question before us is whether the evidence offered by the defendant amounted to a legal defense. Therefore, unlike the usual criminal appeal, we do not commence with the situation where the factual issues to which the law is being applied have been resolved aganist the defendant, in which case we can ignore his version of the facts. Here the defendant is entitled to a review of his proposed defense on the basis that all that appears in the record favorable to him is to be taken as true. Looking at the record in this light, a jury could have found the facts as follows:

Defendant was white, nineteen years old, five feet, nine inches tall and weighed about one-hundred and fifty pounds. At the Moberly Training Center for Men, the prison population was composed of about six-hundred inmates, mostly

second offenders at least twenty-five years old, and at least twenty-five inmates were serving life sentences. The inmates were confined in single cells within a residential building. The physical structure of the residential building was formed by a central rotunda with the four inmate wings radiating outward. Within each inmate wing, there were seventy-nine cells. During the day, the inmates could wander freely within the residential building. The inmates were locked in the cells at night.

There were two guards assigned to each residential building for the period of the night shift. One of these guards stayed in the rotunda. The rotunda was separated from each wing by a heavy door. The second guard walked a circuit among the four wings. There were substantial periods of time during which a wing would be without supervision.

There was a lock on the outside of each cell. The door could be unlocked with a master key. It appears that several master keys were illicitly in the hands of the inmates. These locks could easily be picked with any sharp object. There were no locks on the inside of the cell doors.

Inmate complaints could be sent to the prison administration by the use of "snitch-kites". A "snitch-kite" consisted of a written complaint transmitted through the intra-prison mail. It required several days to obtain any response to a "snitch-kite". An inmate could complain directly to a guard. Because of the physical structure of the residential buildings, it would be difficult to complain to a guard without the other inmates being aware of this action. Administrative policy was not to investigate a complaint of physical abuse unless the assailant was identified. But if an inmate "snitched"—turned in somebody's name—his life

wouldn't be worth "a plugged nickel"; he (the snitch) "was as good as dead right then". Unless a guard witnessed an assault, the alleged assailant would be allowed to remain within the general population during the investigation. The victim of an assault could be removed from the general prison population. However, such an inmate would be confined to the "hole", which was the area used to discipline prisoners. The prison provided no other facilities for the protective custody of a threatened inmate.

In late December, 1966, or early January, 1967, during the night, two inmates, one white, one black, picked the lock of defendant's cell door. At knifepoint, defendant was homosexually ravaged by both inmates. Two weeks later, three inmates, black and white, invaded defendant's cell, knocked him unconscious as he tried to flee, and raped him. Homosexual acts including sexual assaults were matters of common knowledge among the inmates.[1]

[1] During the offer of proof, several individuals who had been imprisoned at the Moberly Training Center for Men testified to the accuracy of this statement. In 1968, the Philadelphia District Attorney's Office and the Police Department investigated the incidence of sexual assaults within the prison system of Philadelphia. The report of this investigation was summarized in Davis, Sexual Assaults in the Philadelphia Prison System and Sheriff's Vans, 6 Transaction 8, (Dec. 1968). This article noted at page 9: "... sexual assaults in the Philadelphia prison system are epidemic ... [V]irtually every slightly-built young man committed by the courts is sexually approached within a day or two after his admission to prison. Many of these young men are repeatedly raped by gangs of inmates. Others, because of the threat of gang rape, seek protection by entering into a homosexual relationship with an individual tormentor. Only the tougher or more hardened young men, and those few so obviously frail that they are immediately locked up for their own protection, escape homosexual rape." The problem is not limited to the prison system of Philadelphia. A recent article in a metropolitan Missouri newspaper reported that two inmates had sexually assaulted a seventeen year old youth in the St. Louis County jail. St. Louis Post-Dispatch, August 13, 1971, at 10A. In recent years, the courts have acknowledged the

Following each sexual assault, the defendant injured or feigned injury to himself, in order to contact the prison administration. While hospitalized after the first attack, defendant informed the Assistant Superintendent of Treatment of the assault and requested protection. This prison official admonished the defendant to defend himself, and upon release from the hospital, defendant was returned to the same cell. After the second attack, defendant was taken before the Disciplinary Board where he informed the Board about the assaults. The Assistant Superintendent of Custody, a member of the Board, told defendant that the only protection defendant would receive was a cell change. This prison official told defendant that the alternatives were to defend himself, submit, or "go over the fence".

On April 14, 1967, defendant returned to his cell during the lunch break. Four or five black inmates gathered around his cell. They informed defendant of their knowledge of the previous acts of sodomy. They told him that they would return that evening to make him a "punk" (a person who plays a female role in homosexual incidents) for the remainder of his time in prison. These inmates threatened to "beat his head in" or kill defendant if he would not submit. Defendant believed it would do no good to ask the prison authorities for help, in view of what he had been told in response to his previous attempts to get help, so to avoid what he believed was inevitable, he quietly

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existence of this situation, e.g. Holt v. Sawyer, (E.D. Ark.), 309 F. Supp. 362; and it has been discussed in the scholarly journals. Comment, 48 L. Rev. 847, 865-869 and Note, 53 Ia. L. Rev. 671, 697-700. For a prisoner's comment on homosexuality within the prison, see Griswold, Misenheimer, Powers, and Tromanhauser, An Eye For an Eye, 161-172 (1970). It has been estimated the number of inmates who engage in homosexual activity ranges as high as 80%. 53 Ia. L. Rev., supra.

escaped about 6:00 o'clock that evening. He was found the next morning, on the side of a county highway, only a few miles from the prison and surrendered without resistance.

It is a fundamental legal principle that criminal punishment should not be visited upon the blameless. See Holmes, The Common Law, 1948, p. 50; "It is not intended to deny that criminal liability . . . is founded on blameworthiness . . . [A] law which punished conduct which would not be blameworthy in the average member of the community would be too severe for that community to bear . . . ." Juries in criminal cases are instinctively aware of this. One illustration of this principle is the right to present to the jury the defense of self-defense, State v. Robinson, (Mo. Sup.) 328 S.W. 2d 667, where defendant was resisting attempted sodomy. The affirmative defenses of coercion and necessity are based upon the same principle.[2] "If a person commits an act under compulsion, responsibility for the act cannot be ascribed to him since in effect, it was not his own desire, or motivation, or will, which led to the act." Newman and Weitzer, Duress, Free Will and the Criminal Law, 30 So. Cal. L. Rev. 313. There appear to be no Missouri cases considering the defense of necessity, but it is well established that coercion is a defense to all crimes

[2] A few courts and some legal scholars have recognized a distinction between the defenses of coercion and necessity based upon the nature of the force that compels the actor to do the criminal act. Coercion is compulsion exerted by a human force, while necessity is compulsion exerted by a physical force beyond human control. People v. Richards, 269 Cal. App. 2d 768, 75 Cal. Rptr. 597, 601; Hall, General Principles of Criminal Law, (2d ed. 1960) 235-237 and 415-448. Courts often use the terms "coercion" and "necessity" interchangeably. Note, 21 Col. L. Rev. 71; 72. Other legal scholars believe that this distinction has no merit because the requirement in each defense remains a circumstance or condition that leaves no choice of a course of action. 1 Burdick, Law of Crime, (1946), 260-261.

except murder. State v. St. Clair, (Mo. Sup.) 262 S.W. 2d 25, 27.

I interpret the majority opinion to decide that the proposed defense is not available because (1) defendant did not delay his escape until his would-be assailants had him in close pursuit and (2) because he could have avoided his predicament had he only turned in their names earlier in the day.

As to the first, defendant knew from prior experience that if he waited until the band was close at hand, it would be too late. If escape were to save him, it had to be made earlier than the last minute. Five against one is hopeless odds. As to the second, this overlooks the evidence that to turn in the names to the prison authorities meant defendant was risking his life by being a "snitch".

Defendant had already been told by a high prison official that he had three alternatives: submit, defend himself, or escape. The majority opinion does not recommend submission, and as a practical matter, self defense was impossible. All that was left was escape, and under these circumstances, the coercion and necessity were not remote in time, but present and impending. Escape or submission (and I do not believe defendant was unreasonable in not being willing to submit to five-fold sodomy) were literally all this defendant had left.[3]

There is a number of cases in which the defense of coercion has been offered to justify an escape, 70 A.L.R. 2d 1430. These escape cases differ from the majority of cases in which the defense of coercion is asserted. Usually, the defendant is charged with the very crime that he was di-

[3] It would be a fantasy to consider that defendant could have gained access to the courts during the few hours before the assault was to occur even had he so desired.

rectly coerced to submit. State v. St. Clair, (Mo. Sup.), supra; State v. Lee, 78 N.M. 421, 432 P. 2d 265; 40 A.L.R. 2d 908. For instance, if the defendant here had been prosecuted for sodomy as a result of the first assault, it would seem clear that a defense of coercion would be available. In this case defendant sought to avoid committing the coerced act by resorting to escape. Because he was a prisoner, this action was a crime. The act of escape was just as much coerced as the prior act of sodomy. It is consistent with the principle underlying the defense to allow it to be asserted here.

This case differs much from the usual escape case. Defendant should have been permitted to submit to the jury the defense of coercion as justification for the escape, and I, therefore, respectfully dissent. The evidence shows defendant was confronted with a horrific dilemma, not of his making. No one, I am sure, wants to force a prisoner to live under conditions where he must either become a "punk" and debase himself, or a "snitch" at the risk of his life, but nevertheless this is the effect of our decision, until and unless the state improves the conditions in the prisons. I am not advocating that we should permit each prisoner to determine whether the conditions of his imprisonment justify an escape. What I am saying is that when the facts presented, if believed, would establish the defense of coercion, then this defense should be available to a charge of escape.

ROBERT E. SEILER
Judge

The Oral Ruling of the Trial Court in the Circuit Court of Randolph County, Missouri

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At the close of all evidence, the Court made the following oral ruling, as follows:

> The Court: by the information filed in this case, the Defendant, John Charles Green, is charged with the events commonly called escape, which allegedly was committed in Randolph County, Missouri, on or about April 14, 1967. The information sets forth, that while he was lawfully confined in the Missouri Training Center for Men, a penal institution of the State of Missouri, that he unlawfully and feloniously did escape therefrom, contrary to the law, and against the peace and dignity of the State. In ad-
>
> —545—
>
> dition, the information contains an allocation that John Charles Green had theretofore been convicted, sentenced and lawfully imprisoned upon the charge of burglary, allegedly committed in Adair County, Missouri.
>
> The effect of the latter charge would be simply to bring the charge and the information under the provisions of the Habitual Criminal Act—so-called—and the effect would have been to have withdrawn from the jury, if the case had been tried before a jury, the question and adjustment of punishment, in the event that a verdict of guilty was found.
>
> In the circumstances of this case, with the jury waived, the Court is both the Trior of the Facts and the one who determines on the Finding of guilty and determines the necessity for punishment.

The Court declares the law of Missouri to be, that one who has been lawfully convicted and sentenced of a crime, and who has been lawfully confined in a penal institution of the State of Missouri, who, during such a period of confinement, without authority or permission or consent of the employees or agents of the State, who goes outside the confines—the wall—the prison wall—the fence if there is a fence—or the perimeter, if that is the proper term

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to use, with the intent so to do; is guilty of the offense of escape, and if the charge upon which person is confined is a felony, the escape from custody is also a felony.

The Court finds, as the facts established by the evidence and beyond a reasonable doubt, that the Defendant, John Charles Green, was duly and lawfully convicted of the crime of burglary in the Circuit Court of Adair County, Missouri, and that offense was punishable by imprisonment in the State Penitentiary; or as our law now provides, in the State Penitentiary under the supervision of the Department of Correction of the State of Missouri, which by law is authorized to place convicted persons in suitable penal institutions in the State.

That, in accordance with the conviction of which I have just spoken in Adair County, this Defendant was, on the 1st day of January, sentenced by the Circuit Court of Adair County to imprisonment for a term of three years; and that in accordance with that sentence of judgment, he was lawfully confined in the Missouri Training Center for Men, Moberly, Missouri in Randolph County, Missouri; and that

thereafter, on the 4th day of November, his confinement began in the Institution I have mentioned, and thereafter, on or the 15th Day of April, 1967,

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that the Defendant, John Charles Green, did unlawfully and feloniously escape therefrom, and go at large; and the cause of these Findings by the Court, supported by the evidence, beyond a reasonable doubt, he is guilty of the charge of escape as laid in the information.

Mr. Falzone: If the Court please, I believe that it was a slip of the tongue, that indicated in your Finding of Fact that he was received, in accordance with that conviction, by the Department of Correction, on the 1st day January.

The Court: Did I say January?

Mr. Falzone: I believe you did, Judge. I know it was a slip of the tongue. If it was a slip of the tongue, and you intended to say the 1st day of November, 1966, perhaps you can so indicate.

The Court: The significant dates, of course, I thought about this—instead of mentioning the dates was simply to say the dates shown in evidence which were not disputed. This might be the safest way to to do this. The Finding will be that the conviction took place on the 1st day of November, 1966 and that the incarceration began on the 4th day of November, 1966. Now, have I corrected that?

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Mr. Falzone: Yes, sir.

The Court: If I make any further or additional slips of the tongue, call my attention to it.

The Court will further find as specific Facts, that on or about the 14th and 15th days of April, 1967, the

Defendant, knowingly and unlawfully and willfully and feloniously went outside the perimeter area of the penal institution mentioned before, and located in Randolph County, Missouri; and that he was apprehended by a member of the State Highway Patrol, some hours later, at some distance from the penal institution in Randolph County, but completely outside the prison area or the prison perimeter.

Are there any further suggestions as to the Finding of Fact?

COUNSEL FOR STATE AND DEFENSE SIGNIFY NOTHING FURTHER.

The Court: Of course, the Court will add the finding of the Defendant is guilty and all Findings of Fact not made specifically, will be made in accordance with the Finding of guilty for the result reached. I think, gentlemen, that should be sufficient.

Now, at this time, if this were a jury trial, a verdict of guilty had been returned, which is, in effect, what the Findings and Declarations of the Court amount to, and if the jury had been instructed

to find the—access the punishment on the finding of guilty, that punishment would be incorporated in the verdict.

Perhaps it is the best procedure for the Court at this time to access the punishment for this offense, and the Court, at this time, accesses the punishment of John Charles Green at confinement in the State Penitentiary under the supervision of the Department of Correction, for a term of three years.

Now, gentlemen, I believe that concludes the proceedings today, except that you want some time to file a motion for a new trial.

Mr. Carmody: Your Honor, at this time I would like to ask the Court to extend the period of time for filing the motion for a new trial. I believe it is thirty days maximum, in addition to the fifteen days provided by Rule.

The Court: Thirty days will be granted to file a motion for a new trial.

COURT ADJOURNED.

The Sentence and Judgment of the Circuit Court of Randolph County, Missouri

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Thereafter on the 8th day of September, 1969, in the Circuit Court of Randolph County, the following Sentence and Judgment was had, to-wit;

IN THE CIRCUIT COURT WITHIN AND FOR SAID COUNTY

BE IT REMEMBERED that heretofore to-wit: On the 8th day of September, A.D., 1969, at the regular June Term of the Circuit Court, begun and held at the Court House in the City of Moberly, in the county and state aforesaid, before the Honorable Lawson Romjue, as Special Judge of said Court, the following, among other proceedings, were had and appear of record, to-wit:

No. 20622

STATE OF MISSOURI

Plaintiff

vs.

JOHN CHARLES GREEN

Defendant

Upon an Information charging the Defendant with Escape from the Missouri Training Center for Men, at Moberly, Missouri, contrary to Section 557.351 Missouri Revised Statutes:

On the 22nd day of November, 1967, the State of Missouri appeared by its prosecuting attorney, and the De-

fendant also appeared in proper person in open court, and, the Defendant announced he was not represented by counsel and was financially unable to obtain counsel of his own choice, and the Court informed the Defendant of his right to counsel and explained wherein the exercise of said right might be of benefit to the Defendant, and, at the request of the Defendant Honorable John F. Carmody, a member of

the bar, as counsel for the Defendant and notified said counsel that a reasonable time would be allowed in which to prepare the defense.

Thereafter, to-wit on December 13, 1967, Defendant appeared in person, and with his attorney, Honorable John F. Carmody, and said Defendant waived formal arraignment and entered a plea of not guilty to charge of escape, contained in the Information filed herein.

On April 22, 1969, following a pre-trial hearing of evidence respecting defense desired to be asserted by Defendant, under the provision of Rules 25.06 and 25.09 of the Supreme Court of Missouri, the Court having ruled that the defense asserted by the Defendant as same could or might be established by the competent relevant material and admissible evidence tendered by the Defendant was not a valid and proper defense to the charge in this cause, after consultation with his counsel Defendant stated he desired to waive trial before a jury.

On April 23, 1969, the State of Missouri appeared by its prosecuting attorney, Clifford A. Falzone and by John Dods, Assistant Attorney General of Missouri; and Defendant appeared in person and by his counsel John F. Carmody, and by Mrs. Joan M. Krauskopf, Amicus Curiae, and Defendant renewed his request to waive a jury trial, and the Court interrogated Defendant further, and being

satisfied that Defendant with full knowledge and understanding of his rights respecting same, and after full opportunity to consult his counsel, voluntarily waived his

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right to jury trial the Court assented to same.

Whereupon both the State and the Defendant announce ready for trial. Evidence is adduced by the State of Missouri and the Defendant adduces no evidence and cause is submitted and argument waived.

The Court finds Defendant guilty of the offense of Escape as charged in the Information, and assesses punishment at three years imprisonment in the State Penitentiary.

And now on September 8, 1969, comes the State of Missouri by its prosecuting attorney, and comes the Defendant, in proper person, and by his counsel, C. M. Hufen, Jr., said counsel having been appointed by the Court on May 29, 1969, due to the illness of John F. Carmody, previously appointed, and the Court having overruled Defendant's Motion for new trial, informs the Defendant that he has been found guilty as charged and asks him if he has any reason to give why judgment and sentence should not be pronounced against him in accordance with law and Defendant says nothing. The Court thereupon fixes sentence accordingly.

Wherefore, on the September 8, 1969, it is by the Court considered, ordered, adjudged and decreed that the said Defendant shall be confined in the custody of the Department of Corrections of the State of Missouri in an institution or institutions designated by said Department in accordance with law for a period of three years, the Court

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expressly ordering that the time spent by the Defendant in jail awaiting trial, and prior to his conviction shall be calculated as a part of the term of the sentence imposed

upon him in accordance with Section 546.615 R.S. Mo. 1949, and that the State of Missouri have and recover of the Defendant its costs herein expended and that execution issue thereof, and the Defendant is remanded to the Custody of the Sheriff, to be by him delivered to the Reception Center of the Department of Corrections and a certified copy of this judgment is to be delivered by said Sheriff to the Division of Classification and Assignment of the Department of Corrections in accordance with law. And the said Department of Corrections shall receive and safely keep the said Defendant, until the judgment of the Court herein be complied with or the said Defendant shall be otherwise discharged in accordance with law.

Judgment of the Supreme Court of Missouri

No. 55,031

IN THE

SUPREME COURT OF MISSOURI

May Session, 1971

STATE OF MISSOURI,

Respondent,

—vs.—

JOHN CHARLES GREEN,

Appellant.

APPEAL FROM THE CIRCUIT COURT OF RANDOLPH COUNTY

Now at this day come again the parties aforesaid, by their respective attorneys; and the Court here being now sufficiently advised of and concerning the premises, doth consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Circuit Court of Randolph County rendered, be affirmed; and that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution.

It is further considered and adjudged that the sentence pronounced against the said John Charles Green, appellant herein, by the said Circuit Court of Randolph County be executed, and that the Marshal of this Court arrest the said John Charles Green without delay, wherever he may be found in this State, and deliver him to the Department

of Corrections, Jefferson City, Missouri, to be confined for the period of three (3) years for the escape from a state institution, a felony, the same being the sentence passed by the said Circuit Court of Randolph County.

(Opinion filed.)

STATE OF MISSOURI—Set.

I, MARION SPICER, Clerk of the Supreme Court of the State of Missouri, certify that the foregoing is a full, true and complete transcript of the judgment of said Supreme Court, entered of record at the May Session thereof, 1971, and on the 13th day of September 1971, in the above entitled cause.

Given under my hand and seal of said Court, at the City of Jefferson, this 1st day of December 1971.

.....

Clerk.

.....

D. C.

Supreme Court, U.S.
FILED
MAR 2 1972
E. ROBERT SEAVER, CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-758

JOHN CHARLES GREEN,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-758

JOHN CHARLES GREEN,
Petitioner,

vs.

STATE OF MISSOURI,
Respondent.

RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

OPINIONS BELOW

Petitioner was convicted of escape, Section 557.351, RSMo 1969, in the Circuit Court of Randolph County, Missouri. Judgment and sentence was entered by that court on September 8, 1969 (Petitioner's Appendix, p. 20a-23a). All proceedings in the Circuit Court of Randolph County, Missouri, are unreported.

On direct appeal to the Supreme Court of Missouri, petitioner's conviction was affirmed. That opinion is reported as *State* v. *Green*, 470 S.W.2d 567 (Mo. 1971).

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTIONS PRESENTED

Whether the determination that petitioner's offer of proof in support of his proffered defense of necessity was insufficient to constitute a defense in his prosecution for escape, was in violation of any rights secured to him by the Constitution of the United States and the amendments thereto?

STATUTES INVOLVED

Section 557.351, RSMo 1969, provides:

"Any person sentenced to the state department of corrections upon conviction of escaping or attempting to escape from any state institution in which he was lawfully confined, or from the lawful custody of any person while being transported, shall be sentenced to the department of corrections generally for a term of not less than two and not exceeding five years."

STATEMENT OF THE CASE

On November 1, 1966, petitioner was convicted in the Circuit Court of Adair County, Missouri of the offense of burglary, and sentenced to confinement in the Department of Corrections for the State of Missouri for a period of three (3) years. Subsequently, on December 12, 1966, petitioner was assigned to the Missouri Training Center for Men at Moberly, Missouri. On December 16, 1966, petitioner Green appeared before the disciplinary board for fighting (Tr. 303-304, 370, 402, 448, 469).

On the evening of January 2, 1967, petitioner testified that he was sexually assaulted by two other inmates (Tr.

385, 388-390, 392). After the attack, he decided to go to the administrative personnel and tell them what had happened (Tr. 385). To do this, he decided to slash his arm (Tr. 385, 388, 392, 398, 450, 308). He was taken to the hospital at the institution (Tr. 308, 392, 394, 399). He did not report the sexual assault to the guards (Tr. 394), nor did he tell the doctor about the attack (Tr. 459-460). Petitioner confirmed that he never told anyone the names of his attackers (Tr. 355), and at the time of the evidentiary hearing, refused to give their names (Tr. 353). Petitioner testified that he subsequently told Hartness what had happened (Tr. 394), and indicated that he was told only to fight it out (Tr. 395).

Petitioner believes he was the victim of a second homosexual assault on January 14th or 15th (Tr. 404-439). On that occasion, two men picked the lock to his room (Tr. 404). He did not try to resist their entry (Tr. 404). He was knocked out (Tr. 405), and thinks he was sexually assaulted (Tr. 405). Once again, petitioner refused to divulge their names either at that time or at any subsequent time including the time of the evidentiary hearing (Tr. 456-458). Subsequent to this attack, he told the guards that he had swallowed glass (Tr. 305, 307, 407), and was taken to the hospital (Tr. 408). On January 16, 1967, he appeared before the disciplinary board because of his attempted suicide (Tr. 305, 316-317, 370, 402, 408, 417). As a result of his appearance before the disciplinary board, he was given a cell change (Tr. 306, 409).

After the cell change, there were no other sexual assaults upon petitioner (Tr. 459-463). Rather belatedly, petitioner did recall that a guard had propositioned him in March of 1967 (Tr. 415-416), however, when he told Captain Chapman about the matter, the guard was transferred (Tr. 416).

The incident which petitioner relies upon as necessitating and justifying his escape occurred at noon on April 14, 1967 (Tr. 421-422). Petitioner testified that several inmates threatened him with sexual assault that evening (Tr. 422, 427, 461); and that from the time of that threat, to the time of the escape at approximately 5:30 or 6:00 p.m. (Tr. 461), he did not contact a guard (Tr. 461), or anyone in authority (Tr. 461), nor did he ask anyone for assistance (Tr. 462).

Petitioner had not been subjected to any physical mistreatment by the prison officials (Tr. 434, 475-476), nor did he have any complaint about the facilities (Tr. 439). Petitioner confirmed that none of his privileges had been denied except those which are necessarily restricted for a short period of time because of disciplinary confinement (Tr. 434). He had access to the mail (Tr. 434), no limitations upon his visitors (Tr. 435), access to the inter-institutional mail (Tr. 435), and access to the officials for the purpose of making a complaint (Tr. 436).

ARGUMENT

I.

No Issue of Constitutional Significance Is Presented Because the Court Determined, on the Facts Presented, That the Petitioner's Offer of Proof in Support of His Proffered Defense of Necessity Was Insufficient, in Law and Fact, to Constitute a Defense to His Prosecution for Escape.

Contrary to petitioner's assertion, this case does not present an opportunity for the court to announce guidelines on the safety of prisoners, rights of prisoners to safely and adequately communicate with prison authorities, rights of prisoners to obtain a fair hearing before disciplinary boards, and to obtain access to the courts through

prison provided legal assistance for indigent and ignorant prisoners (Petition for Writ of Certiorari, page 9). This case does not provide any opportunity to broadly consider rules and regulations relating to inmates. Rather, this case presents the limited question as to whether petitioner's offer of proof in support of his proffered defense of necessity was sufficient, in law and fact, so as to constitute a submissible defense to his prosecution for escape.

It is beyond question that certain guarantees of the United States Constitution and the Amendments thereto, including the prohibition against cruel and unusual punishment, apply to prisoners incarcerated in penal institutions. *Johnson* v. *Avery*, 393 U.S. 483 (1969); *Lee* v. *Washington*, 390 U.S. 333 (1968); *Cooper* v. *Pate*, 378 U.S. 546 (964). Although lawful incarceration may properly operate to deprive the inmate of certain rights which would attain to him otherwise. *Price* v. *Johnston*, 334 U.S. 266 (1948).

While the state may not subject any inmate to cruel and unusual punishment, the conditions as shown by petitioner's evidence do not constitute cruel and unusual punishment. While the state may not deny an inmate access to the courts, the circumstances as shown by petitioner's evidence do not demonstrate denial of access to the courts, and such question is not relevant to a determination of the sufficiency of his offered defense. The defense of necessity was not available to petitioner under the facts and circumstances here presented.

Unconstitutional conditions of confinement do not constitute either a defense or justification for an escape. *State* v. *Warren*, 4 N.C.App. 441, 166 S.E.2d 858 (1969). Necessity, as a defense, is not applicable to prosecutions for escape, and, even if applicable, is not supported by the

facts and circumstances here presented. *People* v. *Richards*, 269 Cal.App.2d 876, 75 Cal.Rep. 597 (1969).

Petitioner argues his confinement was unconstitutional because the state placed him in a position so as to be vulnerable to homosexual attacks. Petitioner's evidence is insufficient to establish the infliction of cruel and unusual punishment. Petitioner's evidence suggests that he was subjected to two attacks, which may or may not have been reported promptly and accurately to the prison officials (Tr. 321, 341-342, 347, 374-375, 379, 381-382). In any event, after the second alleged incident petitioner received a cell change and had no further difficuties until the afternoon of April 14, 1967. Thus, a period of three months transpired in which no assaults were made, nor did he make any complaint or have reason to make such complaint to prison officials. When the threat was made on the afternoon of April 14, 1967, petitioner did not inform any of the institution's personnel. In such a situation, it may not be concluded that the state inflicted cruel and unusual punishment on petitioner.

Deprivation of constitutional rights during imprisonment constitutes neither grounds for nor justification for an escape. *State* v. *Warren, supra*. The general state of the law has been summarized as:

> "Prisoners charged with escape have occasionally tried to justify the offense by claiming that the conditions of imprisonment were so intolerable that the confinement became unlawful, but this has not been recognized as a justification. . . ." 27 Am.Jur.2d, Escape, Prison Breaking and Rescue, Section 16, p. 858.

This is the rule which has been adopted in Missouri. As the Supreme Court of Missouri stated in *State* v. *King*, 372 S.W.2d 857, 859 (Mo. 1963):

". . . an attempt to escape is not justifiable 'because the conditions of imprisonment were intolerable or inhumane.'. . ."

Other decisions in Missouri reflect the application of this principle. *State* v. *Pace*, 402 S.W.2d 351 (Mo. 1966); *State* v. *Hart*, 411 S.W.2d 143 (Mo. 1967); *State* v. *Croney*, 425 S.W.2d 65 (Mo. 1968); *State* v. *Rentschler*, 444 S.W.2d 453 (Mo. 1969).

The same position has been adopted by other courts which have considered the issue. *People* v. *Whipple*, 100 Cal.App. 261, 279 P. 1008 (1929); *State* v. *Palmer*, 45 Del. 308, 72 A.2d 442 (1950); *Johnson* v. *State*, 122 Ga. 172, 50 S.E. 65 (1905); *State* v. *Cahill*, 196 Iowa 486, 194 N.W. 191 (1923); *Hinkle* v. *Commonwealth*, 23 Ky.L.R. 1988, 66 S.W. 816 (1902); *State* v. *Davis*, 14 Nev. 439, 33 Am.Rep. 563 (1880); Anno: What justifies escape or attempt to escape, or assistance in that regard, 70 A.L.R.2d 1430, Section 13.

A similar factual situation was presented in *People* v. *Richards, supra*. In that case:

". . . He (defendant) contends that the trial court committed prejudicial error in refusing to receive evidence, embodied in an offer of proof, on a proposed defense of coercion and duress as justification for the offense charged, and in refusing to give proffered instructions on the same issue. These points are examined and found wanting. The judgment must be affirmed." 75 Cal.Rep. at 598.

The court, in describing the nature of the offer of proof, stated it to be:

". . . He represented to the court that acts of sodomy had been inflicted on the defendant, that the defendant did snitch, that threats were made upon his life,

that the guards would do nothing, and that defendant had exhausted every possible remedy short of escape to avoid the threat of death. . . . In response to the court's invitation to make an offer of proof, the defendant represented that inmate Joel Blume would testify 'that inmates told him to remain away from the defendant * * * because Wayne Richards was going * * * to be killed * * * so keep his distance away from him or he would be killed too.' Defendant himself would testify that 'he was told by Mr. Blume who confided in him that he was marked to be killed or seriously injured and that the defendant understood this was going to be imminent, immediate, or as soon as possible and he felt he had two possibilities, one to go to the guards, something that he's tried in the past and the guards have only responded by telling him to punch someone in the mouth or to commit probably a worse crime than escape, and, number two, to remove himself from the threats; and the only other way to remove himself from the threat is to remove himself from the imprisonment, the prison itself; and for this reason the defendant took the only alternative that he saw.'" 75 Cal.Rep. at 599-600.

A similar result was reached in *People* v. *Noble*, 18 Mich.App. 300, 170 N.W.2d 916 (1969). The court there held that it was not a defense to a prosecution for escape that the defendant fled his place of confinement to avoid homosexual attacks by other prisoners. The court in resolving the issue adversely to the appellant therein stated:

"Finally, defendant protests that he only fled the prison work camp in desperation to avoid homosexual attacks by other prisoners. The problem of homosexuality in the prisons is serious and perplexing, and

> never more so than in a case such as this where such activity is forced upon a young man against his will. However, the answer to the problem is not the judicial sanctioning of escapes. While we have no reason to doubt the sincerity of this defendant, it is easy to visualize a rash of escapes, all rationalized by unverifiable tales of sexual assaults. The solution must rather come from some kind of penological reform." 170 N.W.2d at 918.

Petitioner has not demonstrated that under the facts he is entitled to rely upon the defense of necessity. The Missouri rule, reaffirmed in the present decision, is set forth in *State* v. *St. Clair*, 262 S.W.2d 25 (Mo. 1953), when the court stated:

> ". . . But, to constitute a defense to a criminal charge, the coercion must be present, imminent, and impending and of such a nature as to induce a well grounded apprehension of death or serious bodily injury if the act is not done. Further future injury is not enough. Nor can one who has a reasonable opportunity to avoid doing the act without undue exposure to death or serious bodily injury invoke the doctrine as an excuse. . . ." 262 S.W.2d at 27-28.

In this case, as the Circuit Court and the Supreme Court of Missouri found, the evidence demonstrates that the act threatened was not present, imminent, and of such a nature as to indicate that there was not a reasonable opportunity to avoid doing the act, i.e., the escape.

Therefore, this case is not in conflict with decisions of this court, and does not present constitutional questions, because the single issue is whether petitioner's offer of proof in support of his proffered defense of necessity was insufficient, in law and fact, to constitute a defense to his prosecution for escape.

CONCLUSION

Because the decision of the Supreme Court of Missouri was correct; and because there is no conflict between the decision of the Supreme Court of Missouri and the decisions of this court; and because the case does not present a constitutional question, we submit the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

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JOHN CHARLES GREEN,

Petitioner,

—v.—

STATE OF MISSOURI,

Respondent.

PETITIONER'S REPLY BRIEF

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REPLY TO RESPONSE TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

The State of Missouri asserts that no question of constitutional significance is presented because the State fails to recognize the relation between a prisoner's access to grievance procedures or to the courts and the defense of necessity in a prosecution for escape.

In all the cases cited by the State, in its Response to the Petition for Writ of Certiorari it was assumed that legal avenues of relief were open to the Petitioner. The court in *People* v. *Richards*, 75 Cal. Rptr. 597, 269 Cal. App.2d 876, (1969), which is quoted at length at pp. 7-8 by the State, is particularly pertinent on this issue. The California court went on to state that, "The prisoner should be denied self-help by escape and should be relegated to relief through established administrative channels, or, that failing, through the court," 75 Cal. Rptr. at 604.

The question here is different from that in *People* v. *Richards* because Petitioner was denied access to grievance procedures and the courts. In stark contrast to the facts of *Richards,* where the defendant had only asked guards for help, Petitioner asked the highest officials of the institution on two occasions for protection and was told both times that no protection (other than a cell change) was available (Tr. 105, 395, 331, 409, 417).

The State asserts that Petitioner was not denied access to the courts because the mails were open to him. To the contrary, the record suggests that the mails were not so open. Petitioner testified that one letter he had written to the sheriff of the locale in which he had been convicted was returned to him (Tr. 438), and the Superintendent of the institution testified that letters containing derogatory matter were returned to inmates (Tr. 338). The State's position is not only contrary to the facts, it is also contrary to the principle and the holding of *Johnson* v. *Avery,* 393 U.S. 483 (1969). That case holds that an indigent, not well educated, prisoner lacking legal aid or the help of fellow inmates (jailhouse lawyers) is, in fact, denied access to the courts. In other words, access to the mails is not access to the courts.

The facts in *People* v. *Richards* differ significantly from those in this case because there was no evidence whatever that the escapee in *Richards* was denied grievance procedures or access to the courts. In this case, the State has wholly failed to meet the burden imposed by *Johnson* v. *Avery* of showing that access to the courts existed.

Therefore, the issue of necessity was a viable issue which Petitioner should have been permitted to present to a jury in his prosecution for escape. The fact that one member

of the Missouri Supreme Court agrees with Petitioner's position renders it apparent that the evidence, if believed, may have created in the jury a reasonable doubt of Petitioner's guilt and thus led to his acquittal. To refuse to permit presentation of evidence on this asserted defense is surely to deny due process of law to Petitioner.

CONCLUSION

For the reasons set forth in this Reply Brief and in the Petition for Writ of Certiorari, the petition for certiorari should be granted.

Respectfully submitted,

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